

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LUIS MARIANO MARTINEZ,)
Petitioner,)
v.) CIV 08-00785 PHX JAT (MEA)
DORA B. SCHRIRO, et al.,) REPORT AND RECOMMENDATION
Respondents.)

TO THE HONORABLE JAMES A. TEILBORG:

15 Petitioner, who is represented by counsel from the
16 Arizona Justice Project which is affiliated with the Arizona
17 State University School of Law, filed a petition for a writ of
18 habeas corpus pursuant to 28 U.S.C. § 2254 on April 24, 2008.
19 See Docket No. 1. Respondents filed a Limited Answer to
20 Petition for Writ of Habeas Corpus ("Answer") (Docket No. 10) on
21 July 28, 2008, asserting Petitioner's habeas claims are
22 procedurally barred. Petitioner filed a Reply to the Limited
23 Answer to his habeas petition through counsel on September 2,
24 2008. See Docket No. 11.

I Procedural History

26 In August of 2001 a jury found Petitioner guilty on two
27 counts of sexual conduct with a minor under the age of 15. See
28 Answer, Exh. I. The crimes were alleged to have occurred on a

1 single date in 1999 and involved one victim, a girl eleven years
 2 of age on that date. E.g., id., Exh. E at 1-2. The victim was
 3 the child of Petitioner's wife, who resided with the couple and
 4 her two brothers. Id., Exh. E at 1-2. A video-tape of a
 5 forensic interview with the victim by a social worker, during
 6 which the victim described the abuse, was shown to the jury over
 7 the objection of defense counsel. See id., Exh. E at 5.

8 After Petitioner's arrest and before his trial, the
 9 victim recanted her statements to various individuals, including
 10 her grandmother. Id., Exh. E at 8. The victim's grandmother
 11 and the other individuals to whom the victim recanted her
 12 statements testified at Petitioner's trial. Id., Exh. E at 8.
 13 Additionally, a second forensic interview with the social
 14 worker, during which interview the victim recanted her
 15 allegations, was shown to the jury. Id., Exh. E at 6.

16 Petitioner was represented by an appointed public
 17 defender at his trial. See id., Exh. B. At Petitioner's trial,
 18 in response to questions from the prosecution, the victim
 19 repeatedly answered "I don't know" or "I don't remember." Id.,
 20 Exh. N at 3. At Petitioner's trial the victim denied Petitioner
 21 had sexually abused her. Id., Exh. I at 3.

22 The victim's mother, Petitioner's wife, testified for
 23 the defense.¹ Id., Exh. E at 10. Petitioner's wife testified

24
 25 ¹ Prior to the trial the Superior Court appointed counsel
 26 to represent Petitioner's wife because the state informed the court
 27 it believed Petitioner's wife committed a criminal act by providing
 the media with a copy of the grand jury transcript. Outside the
 presence of the jury, before she testified at Petitioner's trial, the
 state indicated that they were considering charging Petitioner's wife

1 that she did not believe her daughter had told the truth about
 2 the alleged incident. Id., Exh. E at 12. Petitioner's wife
 3 also testified that her daughter had told her the daughter had
 4 lied about the alleged abuse both to the police and in the
 5 initial forensic examination. Id., Exh. E at 12-14.

6 On February 19, 2002, pursuant to the jury finding him
 7 guilty, Petitioner was sentenced to consecutive terms of life
 8 imprisonment with no possibility of parole for 35 years pursuant
 9 to each conviction for sexual conduct with a minor. Id., Exh.
 10 I.

11 Petitioner took a direct appeal of his convictions and
 12 sentences. Id., Exh. I. Petitioner was represented by retained
 13 counsel, Ms. Levitt, in his direct appeal. Id., Exh. B. In his
 14 direct appeal Petitioner asserted that the verdicts were against
 15 the weight of the evidence and that the trial court erred by
 16 denying his motion for a mistrial based on prosecutorial
 17 misconduct. Id., Exh. J (petition for review to the Arizona
 18 Supreme Court). Petitioner also asserted the trial court erred
 19 by denying his motion for a new trial based on newly discovered
 20 evidence, i.e., exculpatory statements in the victim's diary
 21 which were produced by the victim's mother after the trial.
 22 Id., Exh. J.

23 with a crime, i.e., disclosure of the transcript. The state also
 24 asserted that any discrepancies in Petitioner's wife's testimony and
 25 her earlier statements might result in charges of perjury. In
 26 response, defense counsel moved for a mistrial based on prosecutorial
 27 misconduct for threatening a defense witness, informing the court that
 Petitioner's wife was shaken and afraid to testify on Petitioner's
 behalf, affecting her credibility before the jury. Answer, Exh. E at
 11.

1 Petitioner's direct appeal was stayed on May 13, 2002,
2 to allow Petitioner's then-pending first action for post-
3 conviction relief to be decided by the trial court. See id.,
4 Exh. A. The same retained counsel represented Petitioner in his
5 direct appeal and his first state action for post-conviction
6 relief. Id., Exh. B & Exh. D. After the conclusion of
7 Petitioner's first action for post-conviction relief, on March
8 22, 2004, the Arizona Court of Appeals affirmed Petitioner's
9 convictions and sentences in his direct appeal. Id., Exh. I.
10 Petitioner sought review of this decision by the Arizona Supreme
11 Court, which declined review on September 21, 2004. Id., Exh.
12 K.

13 Petitioner had initiated a first state action for post-
14 conviction relief pursuant to Rule 32, Arizona Rules of Criminal
15 Procedure, on May 28, 2002, prior to the time his direct appeal
16 was decided. Id., Exh. B. Petitioner was represented by
17 retained counsel, Ms. Levitt, in his first post-conviction
18 action. Id., Exh. B & Exh. F. After asking for several
19 extensions of time to review the record, Petitioner's counsel
20 informed the state court she could find no meritorious argument
21 to raise on Petitioner's behalf. Id., Exh. F. Petitioner did
22 not file a *pro se* pleading in his Rule 32 action and, when the
23 time for doing so expired on April 28, 2003, the state court
24 dismissed the Rule 32 action. Id., Exh. G. As stated *supra*,
25 upon this dismissal Petitioner's ultimately unsuccessful direct
26 appeal resumed and concluded in September of 2004.

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1 Petitioner initiated a second state Rule 32 action on
2 October 18, 2004. Id., Exh. L. In his memorandum of law filed
3 in that action on February 2, 2005, through his current counsel,
4 Petitioner argued to the state court that his trial counsel was
5 unconstitutionally ineffective. Id., Exh. M. Petitioner alleged
6 counsel should have introduced counsel's pretrial interview with
7 the victim as evidence at Petitioner's trial. Petitioner
8 asserts this potential evidence was exculpatory and that counsel
9 also failed to put before the jury other exculpatory pretrial
10 statements made by the victim. Petitioner asserted his trial
11 counsel failed to properly impeach the victim's credibility.

12 Petitioner also alleged his trial counsel erred by not
13 properly impeaching an investigating police officer's testimony.
14 Id., Exh. M. Petitioner further asserted that his trial counsel
15 erred by not fully investigating "Child Sexual Abuse
16 Accommodation Syndrome" ("CSAAS"). Petitioner alleges he was
17 prejudiced by this error when his trial counsel failed to
18 properly cross-examine the state's witness on this subject.
19 Petitioner also argued his trial counsel erred by failing to
20 present character witnesses on Petitioner's behalf. Id., Exh.
21 M. Lastly, in this second Rule 32 action Petitioner alleged Ms.
22 Levitt, who was both his appellate counsel and first post-
23 conviction action counsel, was prejudicially incompetent for
24 failing to raise the issue of his trial counsel's performance.
25 Id., Exh. M.

26 The state court dismissed Petitioner's second Rule 32
27 action on November 4, 2005, finding the petition was not timely
28

1 and that Petitioner had not met an exception to the timeliness
2 rule. The state court also concluded that the claims were
3 procedurally barred, and that the claims were without merit.
4 Id., Exh. N. With regard to the merits of Petitioner's claims,
5 the state court concluded Petitioner's trial counsel's
6 performance was not deficient and that Petitioner was not
7 prejudiced by any of the alleged deficiencies. The state court
8 determined any further impeachment of the victim by her
9 inconsistent pretrial statements would have been cumulative.
10 The state court also decided Petitioner's counsel's strategy to
11 not engage in a battle of experts with regard to CSAAS was not
12 deficient performance nor prejudicial to Petitioner. The state
13 court concluded any such error was not prejudicial, *inter alia*
14 because counsel effectively cross-examined the state's witness
15 on this point. Id., Exh. N.

16 Petitioner sought a rehearing regarding this decision,
17 which motion was denied on December 1, 2005. Id., Exh. O & Exh.
18 P. Although the trial court concluded it had erred by finding
19 the claims stated in the second Rule 32 action time-barred, it
20 again found the claims were procedurally barred and without
21 merit. Id., Exh. P. The Arizona Court of Appeals denied review
22 of this decision on August 31, 2006. Id., Exh. R. The Arizona
23 Supreme Court also denied review on May 22, 2007. Id., Exh. S.

24 Petitioner filed his federal habeas petition on April
25 24, 2008. Petitioner argues he is entitled to federal habeas
26 relief because he was denied his right to the effective
27 assistance of trial and appellate counsel.

1 Respondents contend relief on Petitioner's federal
2 habeas claims is procedurally barred because the claims were not
3 properly exhausted in the state courts and Petitioner has not
4 shown cause for, nor prejudice arising from, his procedural
5 default of the claims. Respondents argue the state court's
6 decision finding consideration of the merits of the claims
7 procedurally precluded was an adequate and independent basis for
8 barring federal habeas relief on the merits of the claims.

9 Replying to the assertion that his claims are
10 procedurally defaulted, Petitioner contends his claims "are not
11 procedurally defaulted because he did not receive the effective
12 assistance of **first post-conviction** counsel--specifically with
13 respect to ineffective assistance of **trial** counsel--to which he
14 was entitled under Halbert v. Michigan, 545 U.S. 605 (2005)."²
15 Docket No. 11 at 2 (emphasis in original). Petitioner asserts
16 "Respondents' procedural-default defense is without merit."

1 Id.. Petitioner notes that his second state action for post-
 2 conviction relief "argued that his ineffective-assistance-of-
 3 trial-counsel claims could not be 'precluded' because (1) he was
 4 entitled to effective assistance of first post-conviction
 5 counsel with respect to the ineffective-assistance-of-counsel
 6 claims, and (2) first post-conviction counsel () was
 7 ineffective." Id.³

8 Petitioner contends his case is controlled by Halbert,
 9 which was issued during the pendency of Petitioner's second
 10 action for state post-conviction relief. Petitioner contends he
 11 has federal constitutional right to the effective assistance of
 12 counsel not only for purposes of his direct appeal but also in
 13 his first state action for post-conviction relief. Petitioner
 14 argues Halbert established this right because, in Arizona, a
 15 defendant's first Rule 32 action is their "first-tier review" of
 16 claims of ineffective assistance of trial counsel. Accordingly,
 17 Petitioner asserts, an ineffective assistance of trial counsel

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19 ³ In Arizona both pleading and non-pleading indigent
 20 defendants are appointed counsel for their first Rule 32 proceedings.
 21 However, this "right" has been held to be a matter of state law, not
 22 a federal constitutional right. In Cook v. Schriro the Ninth Circuit
 23 recently stated: "There is no constitutional right to counsel,
 24 however, in state collateral proceedings after exhaustion of direct
 25 review." 538 F.3d 1000, 2008 WL 3484870, at * 18, citing Pennsylvania
 26 v. Finley, 481 U.S. 551, 556, 107 S. Ct. 1990, 1994 (1987) ("[I]t is
 27 the source of that right to a lawyer's assistance, combined with the
 nature of the proceedings, that controls the constitutional question.
 In this case, respondent's access to a lawyer is the result of the
 State's decision, not the command of the United States
 Constitution."). The Cook decision continues: "Under Arizona law, a
 defendant is only entitled to counsel through the disposition of his
 or her first post-conviction petition. ... Because Cook had no
 constitutional right to counsel at the motion for rehearing [of his
 first post-conviction action] stage, any errors by his counsel could
 not constitute cause to excuse the default..."

1 claim can only properly be raised in a first Rule 32 action and
 2 post-conviction counsel who fails to raise such a claim is
 3 unconstitutionally ineffective. Id. at 6-7 & 10.⁴ Petitioner
 4 further contends that the Arizona courts' procedural rule,
 5 precluding claims of ineffective assistance of post-conviction
 6 counsel in a subsequent Rule 32 action, is not an "adequate"
 7 state rule which would provide an independent basis for barring
 8 consideration of the merits of Petitioner's habeas claims. Id.
 9 at 10. Petitioner also asserts that, if he has procedurally
 10 defaulted his habeas claims, he has established cause to
 11 overcome the default by demonstrating ineffective assistance of
 12 post-conviction counsel, an independent constitutional
 13 violation.

14 **II Analysis**

15 **A. Exhaustion**

16 Section 2254 prevents the District Court from granting
 17 federal habeas relief based on a claim that the petitioner's
 18 federal constitutional rights were violated if the claim was not
 19 "exhausted" in the state courts. See 28 U.S.C. § 2254(b)(1)(A)
 20 (2003 & Supp. 2008); O'Sullivan v. Boerckel, 526 U.S. 838, 842,
 21 119 S. Ct. 1728, 1731 (1999); Rose v. Palmateer, 395 F.3d 1108,

22
 23 ⁴ Adopting this argument would mean that every Arizona
 24 defendant could, as a matter of right which they do not now possess,
 25 bring a second Rule 32 action asserting their post-conviction counsel
 26 was constitutionally ineffective. By this means every defendant could
 27 raise the issue of the effectiveness of their trial counsel for the
 first time in a second Rule 32 action, the non-pleading defendant's
 third avenue of review, because it would be necessary to undertake an
 analysis of the validity of the ineffective assistance of trial
 counsel claim to determine if post-conviction counsel's performance
 was deficient for failing to raise the claim.

1 1110 (9th Cir. 2005). "We may not consider any federal-law
 2 challenge to a state-court decision unless the federal claim was
 3 either addressed by or properly presented to the state court
 4 that rendered the decision we have been asked to review." Cook
 5 v. Schriro, 538 F.3d 1000, 2008 WL 3484870, at *16 (9th Cir.),
 6 quoting Howell v. Mississippi, 543 U.S. 440, 443, 125 S. Ct.
 7 856, 858 (2005). To properly exhaust a federal habeas claim the
 8 petitioner must afford the state the opportunity to rule upon
 9 the merits of the claim by "fairly presenting" the claim to the
 10 state's "highest" court in a procedurally correct manner. See,
 11 e.g., Duncan v. Henry, 513 U.S. 364, 365, 115 S. Ct. 887, 887-88
 12 (1995); Rose, 395 F.3d at 1110.

13 **B. Procedural default**

14 A federal habeas petitioner has not exhausted a federal
 15 habeas claim if he still has the right to raise the claim "by
 16 any available procedure" in the state courts. 28 U.S.C. §
 17 2254(c) (2003 & Supp. 2008). Because the exhaustion requirement
 18 refers only to remedies still available to the petitioner at the
 19 time they file their action for federal habeas relief, it is
 20 satisfied if the petitioner is procedurally barred from pursuing
 21 their claim in the state courts. See Woodford v. Nqo, 541 U.S.
 22 81, 126 S. Ct. 2378, 2387 (2006); Castille v. Peoples, 489 U.S.
 23 346, 351, 109 S. Ct. 1056, 1060 (1989).

24 Accordingly, if it is clear the habeas petitioner's
 25 claim is procedurally barred pursuant to state law, the claim is
 26 exhausted by virtue of the petitioner's "procedural default" of
 27 the claim. See, e.g., Woodford, 541 U.S. at 92-93, 126 S. Ct.
 28

1 at 2387. Procedural default occurs when a petitioner has never
2 presented a federal habeas claim in state court and is now
3 barred from doing so by the state's procedural rules, including
4 rules regarding waiver and the preclusion of claims. See
5 Castille, 489 U.S. at 351-52, 109 S. Ct. at 1060; Johnson v.
6 Lewis, 929 F.2d 460, 462 (9th Cir. 1991). Procedural default
7 also occurs when a petitioner did present a claim to the state
8 courts, but the state courts did not address the merits of the
9 claim because the petitioner failed to follow a state procedural
10 rule, including rules regarding waiver and the preclusion of
11 claims. See, e.g., Ylst v. Nunnemaker, 501 U.S. 797, 802, 111
12 S. Ct. 2590, 2594-95 (1991); Coleman v. Thompson, 501 U.S. 722,
13 727-28, 111 S. Ct. 2546, 2553-57 (1991); Ellis v. Armenakis, 222
14 F.3d 627, 632 (9th Cir. 2000); Szabo v. Walls, 313 F.3d 392, 395
15 (7th Cir. 2002).

16 However, the state procedural bar providing for the
17 exhaustion of a habeas claim is also an adequate and independent
18 state law basis for a federal court to deny review of the merits
19 of a petitioner's claims for federal habeas relief. "A federal
20 court is precluded from reviewing the merits of a claim when the
21 state court has denied relief on the basis of an independent and
22 adequate state procedural default." Cooper v. Brown, 510 F.3d
23 870, 924 (9th Cir. 2007). If the District Court finds there is
24 an independent and adequate state procedural ground barring a
25 state court from hearing the merits of a petitioner's claims,
26 "federal habeas review [on those claims] is barred unless the
27 [petitioner] can demonstrate cause for the procedural default

1 and actual prejudice, or demonstrate that the failure to
 2 consider the claims will result in a fundamental miscarriage of
 3 justice." Noltie v. Peterson, 9 F.3d 802, 804-05 (9th Cir.
 4 1993). See also Park v. California, 202 F.3d 1146, 1150 (9th
 5 Cir. 2000). "If a prisoner has defaulted a state claim by
 6 'violating a state procedural rule which would constitute
 7 adequate and independent grounds to bar direct review ... he may
 8 not raise the claim in federal habeas, absent a showing of cause
 9 and prejudice or actual innocence.'" Ellis, 222 F.3d at 632,
 10 quoting Wells v. Maass, 28 F.3d 1005, 1008 (9th Cir. 1994).

11 Federal courts hearing habeas petitions may
 12 not review state convictions, even for
 13 federal constitutional claims, if the state
 14 court judgment procedurally barring the
 15 petitioner's claims rests on an independent
 16 and adequate state law ground. []. Procedural
 17 default, a particular type of adequate and
 18 independent state ground, applies to bar
 19 federal habeas review when the state court
 20 has declined to address the petitioner's
 21 federal claims because he failed to meet
 22 state procedural requirements...

23 Insyxiengmay v. Morgan, 403 F.3d 657, 665 (9th Cir. 2005)
 24 (internal citations and quotations omitted).

25 "For the procedural default rule to apply, however, the
 26 application of the state procedural rule must provide 'an
 27 adequate and independent state law basis' on which the state
 28 court can deny relief." Park, 202 F.3d at 1151, quoting
Coleman, 501 U.S. at 729-30, 111 S. Ct. at 2553-54.
 Accordingly, only a "firmly established and regularly followed
 state practice" may be interposed by a state to prevent habeas
 review of the merits of a federal constitutional claim. Ford v.

1 Georgia, 498 U.S. 411, 423-24, 111 S. Ct. 850, 857 (1991); James
 2 v. Kentucky, 466 U.S. 341, 48-51, 104 S. Ct. 1830, 1835-37
 3 (1984); Collier v. Bayer, 408 F.3d 1279, 1283-84 (9th Cir.
 4 2005). The United States Supreme Court has affirmed that the
 5 Arizona state courts' application of Rule 32.2, Arizona Rules of
 6 Criminal Procedure, precluding the post-conviction review of
 7 issues if the defendant could have but failed to present them at
 8 an earlier proceeding, is a firmly established and regularly
 9 followed state practice. See Stewart v. Smith, 536 U.S. 856,
 10 860, 122 S. Ct. 2578, 2581 (2002). See also Cook, 2008 WL
 11 3484870, at *17; Ortiz v. Stewart, 149 F.3d 923, 931-32 (9th
 12 Cir. 1998); Carriiger v. Lewis, 971 F.2d 329, 333 (9th Cir.
 13 1992).⁵

14 If the state raises the existence of an independent and
 15 adequate state procedural ground as a defense to relief on the

16 ⁵ In a decision published only in the Federal Appendix, the
 17 Ninth Circuit stated:

18 We have previously held that "Arizona's
 19 procedural rules are consistently and regularly
 20 followed and are adequate to bar federal review."
Poland, 169 F.3d at 585. Generally, State rules
 21 are deemed inadequate if they are either
 22 "selectively applied to bar the claims of certain
 23 litigants" or "unsettled due to ambiguous or
 24 changing state authority." Wood v. Hall, 130
 25 F.3d 373, 377 (9th Cir. 1997)....

26 Arizona has not made application of this
 27 procedural bar dependent on an antecedent federal
 28 ruling, such as the determination of
 29 constitutional error. See Carter v. Giurbino,
 30 385 F.3d 1194, 1197-98 (9th Cir. 2004) (finding
 31 independence of procedural default because state
 32 courts "reject sufficiency of the evidence claims
 33 as non-cognizable habeas claims ... solely as a
 34 matter of state law")....

Quintero v. Stewart, 121 Fed. App. 203, 206 (2005).

1 merits of a habeas petitioner's claims, the petitioner must
 2 raise "specific factual allegations that demonstrate the
 3 inadequacy of the state procedure, including citation to
 4 authority demonstrating inconsistent application of the rule,"
 5 to avoid a finding that the rule is an adequate and independent
 6 bar to habeas relief. Bennett v. Mueller, 322 F.3d 573, 584 &
 7 586 (9th Cir. 2003), quoting Hooks v. Ward, 184 F.3d 1206, 1217
 8 (10th Cir. 1999). Otherwise, the petitioner must establish
 9 cause and actual prejudice to avoid imposition of the procedural
 10 bar to relief on the merits of his claims. See Rich v.
 11 Calderon, 187 F.3d 1064, 1066 (9th Cir. 1999).

12 **C. Cause and prejudice**

13 Federal habeas relief based on a procedurally defaulted
 14 claim is barred unless the petitioner can demonstrate a
 15 fundamental miscarriage of justice will occur if the Court does
 16 not consider the merits of the claim, or cause and actual
 17 prejudice to excuse their default of the claim. See House v.
 18 Bell, 547 U.S. 518, 126 S. Ct. 2064, 2076 (2006); Dretke v.
 19 Haley, 541 U.S. 386, 392-93, 124 S. Ct. 1827, 1852 (2004).

20 "Cause" is a legitimate excuse for the petitioner's
 21 procedural default of the claim and "prejudice" is actual harm
 22 resulting from the alleged constitutional violation. See Thomas
 23 v. Lewis, 945 F.2d 1119, 1123 (9th Cir. 1991). To demonstrate
 24 cause, a petitioner must show the existence of some external
 25 factor which impeded his efforts to comply with the state's
 26 procedural rules. See Vickers v. Stewart, 144 F.3d 613, 617
 27 (9th Cir. 1998); Martinez-Villareal v. Lewis, 80 F.3d 1301, 1305

1 (9th Cir. 1996). To establish prejudice, the petitioner must
 2 show that the underlying alleged constitutional error worked to
 3 his actual and substantial disadvantage, infecting his entire
 4 trial with constitutional violations. See Vickers, 144 F.3d at
 5 617; Correll v. Stewart, 137 F.3d 1404, 1415-16 (9th Cir. 1998).
 6 Establishing prejudice requires a petitioner to prove that, "but
 7 for" the alleged constitutional violations, there is a
 8 reasonable probability he would not have been convicted of the
 9 same crimes. See Manning v. Foster, 224 F.3d 1129, 1135-36 (9th
 10 Cir. 2000); Ivy v. Caspari, 173 F.3d 1136, 1141 (8th Cir. 1999).
 11 Although both cause and prejudice must be shown to excuse a
 12 procedural default, the Court need not examine the existence of
 13 prejudice if the petitioner fails to establish cause. See Engle
 14 v. Isaac, 456 U.S. 107, 134 n.43, 102 S. Ct. 1558, 1575 n.43
 15 (1982); Thomas, 945 F.2d at 1123 n.10.

16 Allegedly ineffective assistance of counsel does not
 17 establish cause for the failure to properly exhaust a habeas
 18 claim in the state court unless the specific Sixth Amendment
 19 claim providing the basis for cause was itself properly
 20 exhausted in the state courts. See Edwards v. Carpenter, 529
 21 U.S. 446, 451, 120 S. Ct. 1587, 1591 (2000). Additionally,
 22 "[a]ttorney error does not constitute cause to excuse a
 23 procedural default unless counsel's performance was
 24 constitutionally deficient." Deitz v. Money, 391 F.3d 804, 809
 25 (6th Cir. 2004). See also Coleman, 501 U.S. at 755, 111 S. Ct.
 26 at 2567 ("We reiterate that counsel's ineffectiveness will
 27 constitute cause only if it is an independent constitutional
 28

1 violation").

2 **III Analysis of Respondents' allegation that**
3 **Petitioner's claims are procedurally barred**

4 In denying Petitioner's second action for state post-
5 conviction relief,⁶ after "having considered the arguments of
6 counsel," the state Superior Court concluded "that all issues
7 identified by counsel could have been raised in the original PCR
8 and [] are therefore precluded..." Answer, Exh. N at 4. The
9 Superior Court also addressed the merits of Petitioner's
10 ineffective assistance of counsel claims. The state Superior
11 Court summarized Petitioner's ineffective assistance of trial
12 counsel claims as arguing counsel "was incompetent because he
13 did not properly prepare for and did not present certain
14 evidence at trial; and he did not prevent certain evidence from
15 being admitted during the trial; and Appellate/Post Conviction
16 Relief counsel was incompetent because she failed to raise the
17 issues noted above." Id., Exh. N at 2.

18 The Superior Court noted its review of the record and
19 the fact that it presided over the trial and concluded:

20 [Petitioner's] counsel's arguments do not
21 raise a colorable claim of ineffective
22 assistance of trial counsel, and, in any
23 event, that claim is precluded;
24 Counsel's arguments do not raise a colorable
claim of ineffective assistance of
appellate/Post Conviction Relief [counsel]
and, in any event, the claim lacks any merit;
Counsel failed to raise the one issue that

25
26 ⁶As noted *supra*, Petitioner's first state action for post-
conviction relief was dismissed after his counsel stated she could
27 find no meritorious claims to raise on his behalf and Petitioner did
not file a pro se brief asserting any claims.

1 might have a chance of resulting in review,
2 (ie., the 8th amendment issue re: the length
3 of the mandatory sentence imposed) even
3 though trial counsel raised the issue at
3 sentencing.

4 Id., Exh. N at 2.

5 The state court also noted the victim's inconsistent
6 statements in court and the evidence regarding her recantations
7 and "her 'impeachment' by her prior statements." Id., Exh. N at
8 2. The state court continued that any additional

9 [c]alling of witnesses to testify about [the
10 victim's] recantation or playing a videotape
11 of her defense interview would have been
12 largely cumulative and was not likely to have
13 changed the result. [] The jury was free to
13 and did believe the victim's original
12 reports. This Court presumes, as it must,
13 that trial counsel exercised his trial
13 strategy and discretion appropriately.

14 Id., Exh. N at 3.

15 The state court also found that it could not find fault
16 with counsel's decision to forego a 'battle of the experts'"
17 regarding CSAAS, noting that counsel

18 effectively cross-examined [the state's
19 expert] with respect to what motives a child
20 might have to accuse someone of sexual
21 misconduct. This Court cannot find merit in
22 counsel's extended arguments that an opposing
23 expert could have made a difference. The
24 real issue is whether [the expert] vouched
25 for the victim's credibility... Under the
26 circumstances, this Court is comfortable with
27 the fact that the jury had the opportunity to
28 and did weight the conflicts in the testimony
25 and after approximately eight (8) hours of
26 deliberation, resolved the conflicts in favor
27 of the State ...

26 Id., Exh. N at 3. The state court noted that

1 trial counsel had very limited options
2 available to him to deal with the issue of
3 semen on the victim's nightgown. He did a
4 credible job suggesting the victim's mother
5 wore the nightgown or that the semen got on
6 the nightgown when the victim climbed into
7 her mom's bed or when she changed clothes in
8 the bathroom.

9
10 Id., Exh. N at 3.

11 The Superior Court decided that, "[e]ven were this
12 Court inclined to do so, this Court cannot find that if trial
13 counsel had done everything suggested by counsel in this Post
14 Conviction Relief, the result would have changed." Id., Exh. N
15 at 3. Citing Strickland v. Washington, the Superior Court
16 determined that, because trial counsel's performance was not
17 deficient nor prejudicial, appellate and post-conviction relief
18 counsel's failure to raise the issue was not deficient
19 performance nor prejudicial. Id., Exh. N at 4. Accordingly,
20 the state court concluded Petitioner had not raised a colorable
21 claim of ineffective assistance of trial or appellate or post-
22 conviction counsel.

23 The Arizona Court of Appeals granted review of this
24 decision and denied relief without discussing the merits of
25 Petitioner's ineffective assistance of trial counsel claims.
26 The Arizona Court of Appeals concluded the Superior Court did
27 not abuse its discretion by ruling Petitioner's ineffective
28 assistance of trial counsel claims were precluded by his failure
29 to raise them in his first Rule 32 action. Id., Exh. R at 2.
30 Distinguishing Halbert, the appellate court disagreed with
31 Petitioner's assertion that his ineffective assistance of trial
32 counsel claims were not precluded by his failure to raise
33 them in his first Rule 32 action. Id., Exh. R at 2.
34

1 counsel claims were not precluded because his first post-
 2 conviction counsel's performance was allegedly defective for
 3 failing to raise them in that action. Id., Exh. R at 2. The
 4 appellate court stated that Petitioner did not have a
 5 constitutional right to the effective assistance of post-
 6 conviction counsel. Id., Exh. R at 2.

7 A state court's application of a procedural rule, i.e.,
 8 the Arizona courts' application of Rule 32.2, Arizona Rule of
 9 Criminal Procedure governing the waiver and preclusion of
 10 claims,⁷ is not undermined if the state court simultaneously
 11 rejects the merits of the defendant's constitutional claim. See
 12 Harris v. Reed, 489 U.S. 255, 264 n.10, 109 S. Ct. 1038, 1044
 13 n.10 (1989); Bennett, 322 F.3d at 580; Carriker, 971 F.2d at
 14 333. Unless a state court's decision finding a claim

15

7

16 An Arizona state prisoner may obtain collateral
 17 review of any federal constitutional claim in the
 18 Arizona state courts pursuant to Rule 32.1 of the
 19 Arizona Rules of Criminal Procedure. Under Rule
 20 32.2(a) such review is barred, however, if (1)
 21 the issues are still raisable on direct appeal or
 22 on a post-trial motion, (2) they have been
 23 finally adjudicated on the merits on appeal or in
 24 a previous collateral proceeding, or (3) they
 25 were "knowingly, voluntarily and intelligently
 26 not raised at trial, on appeal, or in any
 27 previous collateral proceeding." Subsection (c)
 of Rule 32.2 provides that

28 [t]he court may infer from the petitioner's
 failure to raise an issue on appeal after being
 advised by the sentencing judge of the necessity
 that he do so, or his failure to raise any ground
 then available to him in a previous Rule 32
 proceeding in which he was represented by
 counsel, that he knowingly, voluntarily and
 intentionally relinquished the right to do so.
Johnson v. Lewis, 929 F.2d 460, 463 (9th Cir. 1991).

1 procedurally barred “fairly appears” to rest primarily upon
2 federal law, the District Court should not assume that the state
3 judgment failed to rely exclusively on its own sovereign
4 principles. See Coleman, 501 U.S. at 737, 111 S. Ct. at 2558;
5 Bennett, 322 F.3d at 580. A state decision adequately rests on
6 a state-law basis when the state court “explicitly” invokes a
7 state procedural rule as a separate basis for its decision
8 denying relief and the state court did not make application of
9 the procedural bar depend on an antecedent ruling on federal
10 law. See Vang v. Nevada, 329 F.3d 1069, 1074 (9th Cir. 2003).
11 See also Cooper, 510 F.3d at 924; Bennett, 322 F.3d at 580;
12 Park, 202 F.3d at 1152.⁸

8

[The] AEDPA, [] precludes us from granting a state habeas petition "with respect to any claim that was adjudicated on the merits in State court proceedings" unless the state's adjudication of the claim meets certain criteria. [] We have held that "a state has 'adjudicated' a petitioner's constitutional claim 'on the merits' for purposes of § 2254(d) when it has decided the petitioner's right to post conviction relief on the basis of the substance of the constitutional claim advanced, rather than denying the claim on the basis of a procedural or other rule precluding state court review of the merits." [] Where, as here, no state court considered [the petitioner's] claim on the merits, § 2254(d) is simply inapplicable.

... Because the state courts never adjudicated [the petitioner's] constitutional claim on the merits, but rejected it on procedural grounds, the better course is to decline to address [the] procedurally-barred claim. See Windham v. Merkle, 163 F.3d 1092, 1101 (9th Cir. 1998). However, if the majority insists on reaching the issue, AEDPA is inapplicable, and our precedent requires de novo review.

²⁷ Medley v. Runnels, 506 F.3d 857, 870 (9th Cir. 2007) (Ikuta, J., dissenting) (some internal citations omitted).

1 In this matter the Arizona Court of Appeals, the
2 highest state court to consider the issue, relied on the Rule
3 32.2 procedural bar as an independent basis for denying review
4 of the merits of Petitioner's ineffective assistance of trial
5 counsel claims. The state appellate court clearly and expressly
6 held that the issue was waived pursuant to the state's
7 procedural rules and the state court did not overlook this
8 waiver. The Superior Court's decision to alternatively or
9 simultaneously reject the merits of the claim does not undermine
10 the Court of Appeals' application of the state procedural bar to
11 Petitioner's proper exhaustion of his constitutional claim. See
12 Harris, 489 U.S. at 264 n.10, 109 S. Ct. at 1044 n.10. Compare
13 Belmontes v. Ayers, 529 F.3d 834, 855 (9th Cir. 2008) ("where, as
14 here, the state court did not 'clearly and expressly' rely
15 solely upon procedural default in rejecting a petitioner's
16 claim, this court may address the merits of that claim.");
17 Lambright v. Stewart, 241 F.3d 1201, 1205 (9th Cir. 2001).

18 Petitioner has not shown cause for, nor prejudice
19 arising from, his procedural default of his ineffective
20 assistance of trial counsel claim. Because Petitioner had post-
21 conviction counsel, who decided not to raise an ineffective
22 assistance of trial counsel claim, he was not deprived of any
23 right established by Halbert, i.e., a due process right to
24 appointed counsel. After counsel filed a brief stating she
25 could find no meritorious issues to raise on Petitioner's
26 behalf, Petitioner himself could have filed a pro per petition
27 asserting he was denied the effective assistance of trial
28

1 counsel. At that time, Petitioner's direct appeal had been
 2 stayed and his appointed counsel could have raised any issue
 3 regarding insufficient evidence or the improper admission of
 4 evidence. Even if properly exhausted as a separate claim in the
 5 state courts, which is arguable, Petitioner's post-conviction
 6 counsel's performance was not unconstitutionally deficient nor
 7 prejudicial; the state court concluded the ineffective
 8 assistance of trial counsel claim raised by Petitioner would
 9 have failed on the merits. Because Petitioner was not deprived
 10 of any right to post-conviction counsel or an arguable right to
 11 the effective assistance of post-conviction counsel,⁹ his
 12 allegation of ineffective assistance of post-conviction counsel
 13 does not constitute cause for Petitioner's procedural default of
 14 his ineffective assistance of trial counsel claim.

15 **IV Fundamental miscarriage of justice**

16 Absent a showing of cause and prejudice, review of the
 17 merits of procedurally defaulted habeas claims is appropriate if
 18 the petitioner demonstrates review of the merits of his claims
 19 is necessary to prevent a fundamental miscarriage of justice.

20 See Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867

21
 22 ⁹ Petitioner's post-conviction counsel's performance could
 23 arguably constitute cause for his procedural default of his claim that
 24 his trial counsel was ineffective if post-conviction counsel's
 25 performance was defective and Petitioner was prejudiced by the
 26 deficiency. See Cook, 2008 WL 3484870, at *18. However, to succeed
 27 on an assertion his post-conviction counsel's performance was
 28 deficient because counsel failed to raise a particular argument, the
 29 petitioner must establish the argument was likely to be successful,
 30 thereby establishing that he was prejudiced by his counsel's omission.
See Tanner v. McDaniel, 493 F.3d 1135, 1144 (9th Cir.), cert. denied,
 128 S. Ct. 722 (2007); Weaver v. Palmateer, 455 F.3d 958, 970 (9th
 Cir. 2006), cert. denied, 128 S. Ct. 177 (2007).

1 (1995); Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct.
 2 2639, 2649 (1986). A fundamental miscarriage of justice occurs
 3 when a constitutional violation has probably resulted in the
 4 conviction of one who is actually innocent. See Schlup, 513
 5 U.S. at 326-27, 115 S. Ct. at 867 (concluding the "probably
 6 resulted" standard rather than the more stringent "clear and
 7 convincing" standard must be applied); Murray, 477 U.S. at 485-
 8 86, 106 S. Ct. at 2649; Thomas v. Goldsmith, 979 F.2d 746, 749
 9 (9th Cir. 1992) (showing of factual innocence is necessary to
 10 trigger manifest injustice relief).

11 To satisfy the "fundamental miscarriage of justice"
 12 standard, Petitioner must establish it is more likely than not
 13 that no reasonable juror could have found him guilty of the
 14 offenses. Schlup, 513 U.S. at 327, 115 S. Ct. at 867;¹⁰ Wildman
 15 v. Johnson, 261 F.3d 832, 842-43 (9th Cir. 2001). To be
 16 entitled to consideration of his defaulted habeas claims of
 17 constitutional error Petitioner must present a colorable showing
 18 of factual innocence. See Herrera v. Collins, 506 U.S. 390,
 19 404, 113 S. Ct. 853, 862 (1993) (applying a very high standard
 20 of review to a claim of actual innocence on habeas review
 21 because the reviewing court assumed the trial was free of

22
 23 ¹⁰ The Supreme Court stated in Schlup:
 24 [I]f a petitioner [] presents evidence of
 25 innocence so strong that a court cannot have
 26 confidence in the outcome of the trial unless the
 27 court is also satisfied that the trial was free
 of nonharmless constitutional error, the
 petitioner should be allowed to pass through the
 gateway and argue the merits of his underlying
 claims.
 513 U.S. at 316, 115 S. Ct at 861.

1 constitutional error). If Petitioner does not present
2 supplementary post-trial evidence establishing he is factually
3 innocent, he may not avoid the procedural bar to consideration
4 of the merits of his habeas claims; a claim of factual innocence
5 is not a claim of constitutional error. See Schlup, 513 U.S. at
6 315, 115 S. Ct. at 861; Coley v. Gonzales, 55 F.3d 1385, 1387
7 (9th Cir. 1995).¹¹

20 ¹¹ Even if Petitioner can establish his trial included a
21 constitutional violation, i.e., ineffective assistance of counsel,
22 without "new" evidence of his actual innocence, the violation is not
23 a "miscarriage of justice" because the violation did not result in the
24 conviction of one who is "actually innocent." Conversely, before the
25 Court may excuse Petitioner's procedural error based on the conclusion
26 Petitioner was subjected to a "miscarriage of justice," Petitioner
27 must make a showing that, not only is he factually innocent, but that
his trial included constitutional error, i.e., ineffective assistance
of counsel. See Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851 (1995).
In Schlup, the Supreme Court did not reach the merits of the
petitioner's constitutional claims because it concluded the lower
court erred by not applying the standard stated in Murray v. Carrier
to the petitioner's claim that his actual innocence overcame his
procedural default of his habeas claims.

1 based on "new," reliable evidence not presented at trial. See
 2 Schlup, 513 U.S. at 324-25, 866.

3 To be credible, a claim of actual innocence
 4 must be based on reliable evidence not
 5 presented at trial. Given the rarity of such
 6 evidence, *in virtually every case, the
 allegation of actual innocence has been
 summarily rejected.*

7 Calderon v. Thompson, 523 U.S. 538, 559, 118 S. Ct. 1489, 1502-
 8 03 (1998) (emphasis added).

9 Petitioner has not presented supplementary post-trial
 10 reliable evidence establishing his is factually innocent. See
 11 Scott v. Lavan, 190 Fed. App. 196, 198 (3d Cir. 2006); Sibley v.
 12 Culliver, 377 F.3d 1196, 1206 (11th Cir. 2004). Petitioner has
 13 not presented new evidence which, when considered with the
 14 evidence offered at trial, establishes that no reasonable juror
 15 could have found him guilty. Compare House, 547 U.S. at 537-53,
 16 126 S. Ct. at 2077 (holding that the Schlup standard was
 17 satisfied where new DNA evidence disproved the prime murder
 18 motive of sexual assault, significant issues existed with the
 19 collection of other forensic evidence, and new evidence existed
 20 that the victim's husband may have confessed to the crime).

21 Furthermore, Petitioner has not supported his
 22 allegations of constitutional error with new reliable evidence,
 23 i.e., exculpatory scientific evidence, trustworthy eyewitness
 24 accounts, or critical physical evidence, that was not presented
 25 at trial, which would establish his actual innocence. See
 26 Schlup, 513 U.S. at 324, 115 S. Ct. at 865.

1 **V Merits of Petitioner's claim that his trial counsel**
 2 **was unconstitutionally ineffective, in violation of Petitioner's**
 3 **Sixth Amendment rights.**

4 Should the Court conclude that the state court's
 5 decision was based on the merits of Petitioner's ineffective
 6 assistance of trial counsel claims rather than an adequate and
 7 independent state procedural bar, or if the Court concludes that
 8 Petitioner has shown cause for his procedural default of his
 9 ineffective assistance of trial counsel claim, the undersigned
 10 concludes the claim may alternatively or additionally be denied
 11 on the merits.

12 To state a claim for ineffective assistance of counsel,
 13 a petitioner must show that his attorney's performance was
 14 deficient and that the deficiency prejudiced the petitioner's
 15 defense. See Strickland v. Washington, 466 U.S. 668, 687, 104
 16 S. Ct. 2052, 2064 (1984); Lambright, 241 F.3d at 1206. The
 17 petitioner must overcome the strong presumption that his
 18 counsel's conduct was within the range of reasonable
 19 professional assistance required of attorneys in that
 20 circumstance. See Strickland, 466 U.S. at 687, 104 S. Ct. at
 21 2064; Womack v. Del Papa, 497 F.3d 998, 1004 (9th Cir. 2007),
 22 cert. denied, 128 S. Ct. 928 (2008). "A fair assessment of
 23 attorney performance requires that every effort be made to
 24 eliminate the distorting effects of hindsight, to reconstruct
 25 the circumstances of counsel's challenged conduct, and to
 26 evaluate the conduct from counsel's perspective at the time."
 27 Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Indeed,

1 "strategic choices made after thorough investigation of law and
2 facts relevant to plausible options are virtually
3 unchallengeable...." Id., 466 U.S. at 690-91, 104 S. Ct. at
4 2066.

5 To succeed on this claim Petitioner must demonstrate
6 his trial counsel's errors rendered the result unreliable or the
7 trial fundamentally unfair. Lockhart v. Fretwell, 506 U.S. 364,
8 372, 113 S. Ct. 838, 844 (1993); Strickland, 466 U.S. at 694,
9 104 S. Ct. at 2068. Review of counsel's performance is "highly
10 deferential" and there is a "strong presumption" that counsel
11 rendered adequate assistance and exercised reasonable
12 professional judgment. See Strickland, 466 U.S. at 690, 104 S.
13 Ct. 2052. Petitioner must prove both elements of his Strickland
14 claim, i.e., both deficient performance and prejudice, to be
15 awarded federal habeas relief on this basis. See, e.g., Cooper,
16 510 F.3d at 925.

17 Petitioner's assertions of error by trial counsel
18 involve counsel's alleged failure to present evidence of the
19 victim's inconsistent statements and recantation of her original
20 claim of abuse. The state court found and the undersigned
21 agrees that the decision by counsel to not introduce this
22 evidence was neither deficient nor prejudicial because further
23 impeachment evidence would have been cumulative, given that the
24 victim's testimony itself was vague and contradictory and the
25 fact that she recanted her allegations on the witness stand.
26 Furthermore, other testimony was introduced of the victim's
27 recantations, including her second forensic interview and the
28

1 testimony of her grandmother and mother. The jury obviously
2 found the initial video-taped interview of the victim's
3 statement, in addition to the limited physical evidence, to be
4 believable notwithstanding all of the testimony and evidence of
5 recantation. The jury was also presented with evidence
6 regarding the victim's potential motives for allegedly falsely
7 accusing Petitioner including the effective cross-examination of
8 the state's expert and, accordingly, counsel's "failure" to call
9 another expert was not deficient performance nor has Petitioner
10 established that any such error was prejudicial.

11 **VI Conclusion**

12 Petitioner's claim that he was denied his Sixth
13 Amendment right to the effective assistance of trial counsel is
14 procedurally barred because the claim was not properly exhausted
15 in the state courts and Petitioner has not shown cause for, nor
16 prejudice arising from, his procedural default of a Sixth
17 Amendment claim. Petitioner has not shown that review of the
18 merits of his claim is necessary to prevent a fundamental
19 miscarriage of justice or that he is factually innocent of the
20 crimes of conviction.

21 Alternatively, should the Court conclude that the state
22 court's decision was based on the merits of Petitioner's
23 ineffective assistance of trial counsel claims rather than an
24 adequate and independent state procedural bar, or if the Court
25 concludes that Petitioner has shown cause for his procedural
26 default of his ineffective assistance of trial counsel claim,
27 the claim may be denied on the merits.

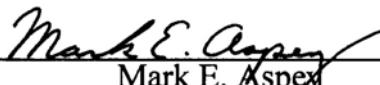
1 **IT IS THEREFORE RECOMMENDED** that Mr. Martinez' Petition
2 for Writ of Habeas Corpus be **denied and dismissed with**
3 **prejudice.**

4 This recommendation is not an order that is immediately
5 appealable to the Ninth Circuit Court of Appeals. Any notice of
6 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
7 Procedure, should not be filed until entry of the district
8 court's judgment.

9 Pursuant to Rule 72(b), Federal Rules of Civil
10 Procedure, the parties shall have ten (10) days from the date of
11 service of a copy of this recommendation within which to file
12 specific written objections with the Court. Thereafter, the
13 parties have ten (10) days within which to file a response to
14 the objections. Pursuant to Rule 7.2, Local Rules of Civil
15 Procedure for the United States District Court for the District
16 of Arizona, objections to the Report and Recommendation may not
17 exceed seventeen (17) pages in length.

18 Failure to timely file objections to any factual or
19 legal determinations of the Magistrate Judge will be considered
20 a waiver of a party's right to de novo appellate consideration
21 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
22 1121 (9th Cir. 2003) (en banc). Failure to timely file
23 objections to any factual or legal determinations of the
24 Magistrate Judge will constitute a waiver of a party's right to
25 appellate review of the findings of fact and conclusions of law
26 in an order or judgment entered pursuant to the recommendation
27 of the Magistrate Judge.

1 DATED this 16th day of September, 2008.
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6 Mark E. Asper
7 United States Magistrate Judge
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